NO. 69

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

ROBERT A. BELL, JR.,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

SUPPLEMENTAL BRIEF OF RESPONDENT

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General

T. B. WRIGHT
Executive Assistant Attorney General

HOWARD M. FENDER
Assistant Attorney General

Attorneys for Respondent
Capitol Station
Austin, Texas 78711

LIST OF AUTHORITIES

STATUTES

CONSTITUTIONS

NO. 69

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

ROBERT A. BELL, JR., *Petitioner*

vs.

THE STATE OF TEXAS, *Respondent*

SUPPLEMENTAL BRIEF OF RESPONDENT REPLY BRIEF FOR THE PETITIONER

I.

Petitioner Bell has filed a supplemental brief with this Court and we respectfully request permission of the Court to file additional authorities and argument in answer thereto.

II.

THE NECESSITY OF INJECTING PETITIONER'S PRIOR CRIMINAL RECORD INTO THE INSTANT CASE

Petitioner Bell complains to this Court because the indictment reflecting he had been convicted of bank robbery in Federal Court was read to the jury during his trial in State Court and evidence was introduced in connection with this former conviction. Petitioner

Bell had the opportunity to admit identity. He elected not to do so. By his election, he required the State to prove the existence of a former conviction and his identity in relation thereto. Article 62 of Vernon's Texas Criminal Code provides for enhancement of punishment upon proof of conviction of a like offense. Since Petitioner Bell would not admit to his identity and the existence of such prior offense, then this proof became essential. The necessity for this proof was discussed in the case of *Graham v. West Virginia,* 224 U.S. 616, 32 Sup. Ct. 583, 56 L. Ed. 917. The decisions have been consistent since that time that the questions of identity and existence of the prior convictions are questions of fact to be determined by the jury in a jury trial.

Federal practice has long recognized the propriety of trying the issue of the former conviction together with the current charge. The Circuit Court of Appeals (8th Cir.) in *Massey v. United States,* 281 Fed. 293, review this procedure and set out the authorities applicable. After holding that it was not error to read an indictment to the jury containing information as to the current offense as well as prior convictions, the Court stated:

> "Statutes providing for greater punishment of second or subsequent offenses by the same person have long been in force in this country and in England (Graham v. West Virginia, 224 U.S. 616, 623, 32 Sup. Ct. 583, 56 L. Ed. 917), and are to be found in the legislation of nearly every state in the Union. It is the established rule, under such statutes, unless the statute designates a different mode of procedure, that, if the prosecutor desires to invoke the severer punishment provided as to second or subsequent offenders, the indictment or

information must allege the fact of the prior conviction, and the allegation of such conviction must be proved in the trial to the jury. 1 Hale, P. C. 686; Reg. v. Jones, 6 C & P 391; Singer v. United States (C. C. A.) 278 Fed. 415, 420; Tuttle v. Com, 2 Gray (Mass.) 505, 506; Garvey v. Com., 8 Gray (Mass.) 382, 383; Commonwealth v. Walker, 163 Mass. 226, 228, 39 N.E. 1014; Walsh v. Commonwealth, 24 Mass. 39, 40, 112 N.E. 486; Johnson v. People of the State of N. Y., 55 N.Y. 512, 514; People v. Sickles, 156 N.Y. 541, 554, 546, 51 N.E. 288; People v. Craig, 195 N.Y. 190, 88 N.E. 38; Maguire v. State, 47 Md. 485, 496; Hall v. State, 121 Md. 577, 89 Atl. 111; Hines v. State, 26 Ga. 614, 616; McWhorter v. State, 118 Ga. 55, 56, 44 S.E. 873; People v. King, 64 Cal. 338, 340, 30 Pac. 1028; People v. Coleman, 145 Cal. 609, 612, 79 Pac. 283; Larney v. City of Cleveland, 34 Ohio St. 599, 600; Blackburn v. State, 50 Ohio St. 428, 436, 36 N.E. 18; Rausch v. Comm., 78 Pa. 490, 494; Commonwealth v. Payne, 242 Pa. 394, 399, 89 Atl. 559; Evans v. State, 150 Ind. 651, 653, 50 N.E. 820; State v. Smith, 129 Iowa, 709, 713, 106 N.W. 187, 4 L.R.A. (N.S.) 539, 6 Ann. Cas. 1023; Hoggett v. State, 101 Miss. 272, 273, 57 South. 812; Long v. State, 36 Tex. 6-9; Mitchell v. State, 52 Tex. Cr. R. 37, 39, 106 S.W. 124; Brittian v. State, 85 Tex. Cr. R. 491, 214 S.W. 351; Thompson v. State, 66 Fla. 206, 209, 63 South. 423; State v. Davis, 68 W. Va. 142, 151, 69 S.E. 639, 32 L.R.A. (N.S.) 501, Ann. Cas. 1912A, 996; State v. Savage, 86 W. Va. 655, 657, 104 S.E. 153; Hettle v. State, 144 Ark. 564, 222 S.W. 1066; State v. Compagno, 125 La. 669, 671, 672, 51 South. 681; State v. Reilly, 94 Conn. 698, 703, 110 Atl. 550; State v. Scheminisky, 31 Idaho, 504, 507, 174 Pac. 611; State v. Briggs, 94 Kan. 92, 95, 145 Pac. 866; State v. Findling, 123 Minn. 413, 416, 144 N.W. 142, 49 L.R.A. (N.S.) 449; State v. Reed, 132 Minn. 295, 296, 156 N.W. 127; State v. Manicke, 139 Mo. 545,

548, 41 S.W. 223; Tucker v. State, 14 Okl. Cr. 54, 57, 167 Pac. 637; Wright v. State, 16 Okl. 458, 460, 184 Pac. 158; State v. Newlin, 92 Or. 589, 596, 182 Pac. 133; State v. Dale, 110 Wash. 181, 184, 187, 188 Pac. 473; Paetz v. State, 129 Wis. 174, 177, 107 N.W. 1090, 9 Ann. Cas. 767; Alsheimer v. State, 165 Wis. 646, 647, 163 N.W. 255; Bandy v. Hehn, 10 Wyo. 167, 174, 67 Pac. 979.

"The same rule will be found stated in 1 Bishop, Cr. Law, §§961-1 to 963-3; Bishop, Stat. Cr. (3rd Ed.) §981; 1 Bish. Cr. Proc. §101-2; Bish. Dir. & Forms, §91; Wharton Cr. Pl. & Pr. (10th Ed.) §1877; 16 Corpus Juris, 1342, 1343; 22 Cyc. 356; note, 24 L.R.A. (N.S.) 436. The statement of a prior conviction is regarded as a part of the description and character of the offense intended to be punished, and as an essential ingredient of such aggravated offense. The accused is entitled to have the exact charge against him stated in the indictment or information, and to have the verdict of the jury upon the fact of a prior conviction for the same offense, and of his identity with the person so convicted, and it is the duty of the government which prosecutes to allege and prove the existence of the prior conviction of the accused as a fact that may cause a severer penalty to be imposed. The allegation and proof of the prior conviction does not prove a different crime from the one charged in the indictment or information on trial, and does not impair the right of trial by jury (McDonald v. Massachusetts, 180 U.S. 311, 313, 21 Sup. Ct. 389, 45 L. Ed. 542; State v. Le Pitre, 54 Wash. 166, 168, 103 Pac. 27, 18 Ann. Cas. 922; People v. Sickles, supra; Maguire v. State, supra; Rand v. Com., 9 Grat. [Va.] 738, 743); and hence there was no error in allowing the information to be read to the jury at the beginning of the trial." (pages 297-298).

This same rule is reiterated in the cases of *McCarren v. United States* (7th Cir.) 8 Fed. 2d 113; *Smith v. United States* (9th Cir.) 41 Fed. 2d 215, and *Heffernan v. United States* (3rd Cir.) 50 Fed. 2d 554. These were not cases arising under state laws but were cases arising under the National Prohibition Act, which provided for enhancement of punishment for second and subsequent offenses.

We are not, however, limited to opinions from Circuit Courts of Appeals to find an expression of this rule. In addition to its recognition in a footnote in *Michelson v. United States,* 335 U.S. 469, discussed in our original brief, we would point out that Mr. Justice Hughes in *Graham v. West Virginia,* supra stated:

> "While it is familiar practice to set forth in the indictment the fact of prior conviction of another offense, and to submit to the jury the evidence upon that issue together with that relating to the commission of the crime which the indictment charges, still in its nature it is a distinct issue, and it may appropriately be the subject of separate determination." (p. 625).

Somewhat later, this Court speaking through Mr. Chief Justice Warren in the case of *Chandler v. Fretag,* 348 U.S. 3, 75 Sup. Ct. 1, in discussing the Tennessee Habitual Criminal Act stated:

> " 'Under section 6 of the Act,' according to the Tennessee Supreme Court, 'the question as to whether the defendant is an habitual criminal is one for the jury to decide.' McCummings v. State, 175 Tenn. 309, 311, 134 S.W. 2d 151, 152. In short, even though the Act does not create a separate offense, its applicability to any defendant charged with being an habitual criminal must be deter-

mined by a jury in a judicial hearing. Compare Williams v. People of State of New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337. That hearing and the trial on the felony charge, although they may be conducted in a single proceeding, are essentially independent of each other. Thus, for example, it is possible that the jury in the instant case might have found petitioner guilty on the housebreaking and larceny charge and yet found him innocent of being an habitual criminal." (348 U.S. 8)

Again this Court in 1962, speaking through Mr. Justice Clark in *Oyler v. Boles* and *Crabtree v. Boles,* 368 U.S. 48, 82 Sup. Ct. 501, 503, stated:

"[2, 3] Even though an habitual criminal charge does not state a separate offense, the determination of whether one is an habitual criminal is 'essentially independent' of the determination of guilt on the underlying substantive offense. Chandler v. Fretag, 348 U.S. 3, 8, 75 S. Ct. 1, 4, 99 L. Ed. 4 (1954). Thus, although the habitual criminal issue *may be combined* with the trial of the felony charge, 'it is a distinct issue, and it may approximately be the subject of separate determination.' Graham v. West Virginia, 224 U.S. 616, 625, 32 S. Ct. 583, 586, 56 L. Ed. 917 (1912)." (Emphasis ours)

Thus this Court has recognized the use and given tacit approval to the practice of including information of prior convictions in the indictment. This Court has also recognized that the issue of identity as relates to the prior conviction must be presented to a jury in the absence of an admission by the defendant.

III.

SETTING OUT NUMEROUS LIKE OFFENSES IN A SINGLE INDICTMENT INJECTS THE ISSUE OF DEFENDANTS CHARACTER AND IS MORE PREJUDICIAL THAN INCLUDING ONLY A SINGLE PRIOR CONVICTION.

While we realize it is a matter of opinion as to whether the inclusion of over 200 alleged like offenses in a single indictment is more prejudicial than the inclusion of only a single prior conviction, we submit that in both instances the character of the defendant has been injected into the case and becomes an issue. A jury is not likely to stop and consider whether or not all of the charges against a defendant can be proved. From the reading of the indictment, particularly one showing over 200 offenses, a jury would be much more likely to assume that a defendant was of bad character than if a single prior conviction were set out.

We submit, however, under the present rules both practices when applicable are constitutionally permissible. It is true that an indictment might be returned as to each Federal offense. At the same time, under Federal rules, indictment for multiple offenses is a standard and accepted practice. We agree that the new Texas Code of Criminal Procedure provides for the question of prior conviction to be presented to the jury for the first time after it has determined the question of guilt or innocence. We also submit that the prior practice of submitting the question of a former conviction together with the charge on the main case and for both to be tried before the same jury at the same time is likewise constitutionally permitted as reflected

by the prior opinions of this Court. We are not here to argue which is the better practice. It is sufficient that either practice is constitutional. Texas has now chosen to adopt a different method than that used at the trial of the instant case. The action of the Legislature in this regard does not make the previous practice unconstitutional and invalid as respects those cases that were tried under former procedure.

IV.

EVIDENCE OF PRIOR CONVICTIONS WERE PROPERLY ADMISSIBLE IN THE PRESENT CASE. While we recognize the general rule of evidence that the prior misdeeds of a defendant are not proper subjects for consideration by a jury, we are certain that this Court recognizes that there are a number of well defined exceptions to this rule. Without listing the number of other exceptions, we do think it sufficient to quote from Professor Wigmore, 3d Ed., §196:

> "Under enlightened modern legislation for *habitual criminals,* the tribunal is authorized to increase the sentence of one whose offense, when established, is found to be the second or a later offense of the sort. The proof of the prior offense for the purpose does not militate against the rule forbidding the use of prior misconduct to evidence character, provided the purpose is kept distinct."

We do concede that Professor Wigmore feels that allowing jurors to fix a criminal sentence is unwise and that furnishing them with information of prior convictions before a verdict is inferior to the other practice, but he does not criticize the rule as being constitutionally impermissive and in violation of the rights of the defendant.

We might ask that if this rule is a *procedural* one and has no affect on the determination of the guilt or innocence of the defendant, then is the defendant protected under the Fifth Amendment against giving information as to his identity and the prior conviction? We would think again if this rule is procedural only, that the Constitution would not prevent him from being placed under oath and questioned as to his identity concerning a former conviction. If he is not required to testify as to the current charge since the evidence of the prior conviction is not an essential element of the present offense and since he is admitting to no criminal act upon which he can be charged in the future, in what manner would his answer under oath to only these pertinent questions constitute self-incrimination? While we are sensitive to the rights of the individual as guaranteed by the Constitution of the United States, perhaps the State is derelict in not placing the defendant under oath and allowing him to testify as to these procedural matters. Certainly should the State take this course of action if Bell were granted a new trial, I do not doubt but that he would contend that the blanket of the Fifth Amendment protected him from answering these questions concerning a matter which he now contends is evidentiary and procedural.

V.

IF THE DECISION OF THIS COURT HOLDS THE FORMER TEXAS PROCEDURE TO BE UNCONSTITUTIONAL IT SHOULD NOT BE RETROACTIVE IN EFFECT.

The State of Texas is asking should this Court find its former procedure for enhancement of punishment

to be unconstitutional, to make the application of the decision prospective only. The petitioner has challenged this request apparently on the mistaken belief that this Court would not reverse this cause for a new trial should prospective application be granted. The State of Texas is merely asking that respective application be given as was granted in *Linkletter v. Walker,* 381 U.S. 618, 85 Sup. Ct. 1731, 14 L. Ed. 2d 601, in order that decisions which are now final would not be affected.

VI.

THERE IS NO QUESTION OF REASONABLE POSSIBILITY THAT THE INJECTION OF EVIDENCE OF PETITIONER'S PRIOR CONVICTION CONTRIBUTED TO HIS CONVICTION.

The facts of this case are undisputed. Petitioner Bell was apprehended a short time after the commission of the alleged crime. The proceeds of the robbery were still in his possession. After escaping from the meat locker of his store in which he had been locked by the robber, the manager notified authorities of the robbery. Two highway patrolmen noticed defendant's car make an abrupt U-turn, apparently on sighting their vehicle and started following him. Defendant was stopped for exceeding the speed limit, vacated his automobile and rushed back to greet the officers. One of the officers walked up to the defendant's car and observed a gold-plated pistol on the front seat. The officers opened the car door and found the proceeds of the robbery on the floor of the car still in the sack which was later identified by the store manager as the identical sack in which the robber had forced him to place the money. After the apprehension of Petitioner Bell, the store

manager identified him as the individual who had committed the holdup. Bell did not take the stand and offer rebuttal testimony. The only evidence offered in his defense was the testimony of his mother who felt that he was temporarily insane at the time he committed the robbery because of various personal problems.

We strongly urge that this case clearly comes within the rules set out by this Court in *Fahy v. Connecticut,* 375 U.S. 85, 84 Sup. Ct. 229. We submit that there is not a reasonable possibility that the inclusion of the account in the indictment of the previous conviction of defendant and the evidence supporting this count might have contributed in any way to the conviction of the defendant. We base this conclusion on the fact that we do not believe that any unbiased jury of reasonable prudent men could have reached a different verdict with or without the charge and evidence of Petitioner's prior offense. We submit that this is a case in which the doctrine of harmless error should be applied even should the Court find that the procedure followed was constitutionally impermissive.

We would urge this Court to carefully weigh the purported violation of Petitioner's rights by injection of the prior conviction together with the overwhelming evidence of his guilt against the rights of society to be protected from further degradations on his part.

It is noted that in the printing of the Brief For Respondent in this case that the printer inserted a paragraph on page 12 that applied to the Reed case rather than to the case at hand and should be disregarded by the Court as it has no application herein.

CONCLUSION

In reliance on the past decisions of this Court and for the reasons here and above set out, it is respectfully submitted the judgment of the Court below should be affirmed.

Respectfully submitted,

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General

T. B. WRIGHT
Executive Assistant Attorney General

HOWARD M. FENDER
Assistant Attorney General

By: ----------
HAWTHORNE PHILLIPS

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of Supreme Court of the United States, certifies that on the ____ day of October, 1966, a true and complete copy of the above and foregoing brief was forwarded to Tom R. Scott, 1006 Midland National Bank Building, Midland, Texas 79701, attorney for petitioner, by United States mail, first class, postage prepaid.

HAWTHORNE PHILLIPS